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BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

05–1450
(AND CONSOLIDATED CASES)

QWEST CORPORATION, ET AL.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties

In addition to the parties listed in the briefs for petitioners, the following parties made presentations to the agency in the proceeding below:

Ad-Hoc Telecommunications Users Committee
Cbeyond Communications
Conversant Communications, LLC
Covad Communications
CTC Communications Corp.
General Communications, Inc.
Mid-Rivers Telephone Cooperative, Inc.
National Cable and Telecommunications Association
Pac-West Telecom, Inc.
Talk America, Inc.
XO Communications

2. Ruling under review

Petitioners challenge the following decision of the Federal Communications Commission:

Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (J.A. 51–114)

3. Related cases

This case has not previously been before this Court. We are not aware of any related case pending before this or any other court.

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TABLE OF AUTHORITIES*

Cases

* Cases and other authorities principally relied upon are marked with asterisks.

Administrative Decisions

Statutes and Regulations

Communications Act of 1934:

Others

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*.
BOC	Bell operating company
CLEC	Competitive local exchange carrier
DS0	Digital Service, level 0: a digital service capable of carrying the equivalent of a single voice call
DS1	Digital Service, level 1: a type of high-capacity loop or transport trunk that is capable of carrying 24 voice calls
DS3	Digital Service, level 3: a type of high-capacity loop or transport trunk with the capacity of 28 DS1s (and therefore capable of carrying 672 voice calls)
ILEC	Incumbent local exchange carrier
MSA	Metropolitan Statistical Area
OC*n*	Optical Carrier: a type of high-capacity loop or transport trunk whose capacity is indicated by *n*; OC1 has the capacity of a DS3, OC3 has three times that capacity, and so on.
QPP	Qwest Platform Plus

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JURISDICTION

The Federal Communications Commission released the order under review on December 2, 2005.[1] Petitions for review were filed on December 12

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[1] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 (2005) (Order) (J.A. 51–114). In this brief, "J.A." refers to the Joint Appendix filed under Rule 30 of the Federal Rules of Appellate Procedure and Local Rule 30, and "Supp. Docs." to the Supplemental Documents lodged with the Court containing certain cited materials that are not part of the administrative record in this case. In the sealed version of this brief, a double underline is used to indicate non-public information omitted from the public version of this brief.

and 28, 2005, and January 11, 24, and 26, 2006. Petitioners invoke the Court's jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Globalcom, Inc., the lead petitioner in No. 06–1014, was not a party to the agency proceeding below and, therefore, may not invoke the Court's jurisdiction under 28 U.S.C. § 2344. *See Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983).

QUESTIONS PRESENTED

Section 10(a) of the Communications Act of 1934 authorizes the Commission to "forbear from applying" a provision of the Act or of the FCC's regulations to a telecommunications carrier or a telecommunications service if the Commission finds that certain criteria have been met. 47 U.S.C. § 160(a). Section 10(c) provides that a petition seeking forbearance "shall be deemed granted if the Commission does not deny the petition" within one year (plus 90 days if extended by the Commission). *Id.* § 160(c).

In the order on review, the Commission granted in part and denied in part a petition filed by Qwest Corporation seeking forbearance from application of certain "dominant carrier" regulations and certain statutory obligations in Omaha, Nebraska, and surrounding areas. The Commission voted to adopt the order on review, publicly announced its decision in a news release, and made the order effective within the deadline specified in § 10(c). The text of the order was released after the statutory deadline had passed.

The questions presented are:

(1) Whether the exhaustion requirement set forth in 47 U.S.C. § 405(a) precludes Qwest from challenging the timeliness or validity of the order on review.

(2) If § 405(a) does not bar review, whether the Commission's partial denial of Qwest's forbearance petition was timely rendered.

(3) Whether the Commission reasonably granted Qwest's request for forbearance from its obligation under 47 U.S.C. § 251(c)(3) to provide competitors unbundled access to local loops and transport facilities.

STATUTORY PROVISIONS

All applicable statutes and regulations are set forth in the appendices to the briefs of the petitioners.

COUNTERSTATEMENT

In the order on review, the Commission granted in part and denied in part Qwest's forbearance petition with respect to its operations in the Omaha market. As relevant here, the Commission concluded that Qwest was entitled to forbearance from the obligation to provide loops and transport to competitors under 47 U.S.C. § 251(c)(3) in light of the substantial facilities-based competition that Qwest faced from Cox Communications, Inc. and competition from carriers using Qwest's wholesale services. The Commission also concluded that § 251(c) had been "fully implemented," and thus that § 10(d), 47 U.S.C. § 160(d), did not preclude the Commission from considering the merits of Qwest's forbearance request.

The competitive local exchange carrier (CLEC) petitioners in this case challenge the Commission's conclusions relating to the partial grant of Qwest's forbearance petition. Qwest, in turn, challenges the Commission's decision not to forbear from: (1) duties imposed by other provisions of § 251(c), (2) the "competitive checklist" in 47 U.S.C. § 271, and (3) with respect to the enterprise market (*i.e.*, medium-sized and large businesses), the Commission's dominant-carrier regulations. Qwest does not take issue with the

Commission's decision on the merits. Instead, it contends that its forbearance petition was "deemed granted" in its entirety because the Commission did not deny the petition within the deadline set forth in § 10(c).

1. In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104–104, 110 Stat. 56, Congress created a "pro-competitive, de-regulatory national policy framework" designed to "open[] all telecommunications markets to competition." H.R. Conf. Rep. 104–458, at 1 (1996). Among other things, the 1996 Act added § 10 to the Communications Act to give the Commission new authority "to reduce the regulatory burdens on the telephone company when competition develops." S. Rep. No. 104–23, at 5 (1996). This new authority allows the Commission to "forbear from applying" any provision of the Communications Act or its regulations to a telecommunications carrier or a telecommunications service if it finds that (1) the statutory or regulatory provision at issue is not necessary to ensure that rates and terms are just, reasonable, and not unreasonably discriminatory, (2) the provision is not necessary to protect consumers, and (3) forbearance would be in the public interest. 47 U.S.C. § 160(a). Before the Commission can forbear from the requirements set forth specifically in §§ 251(c) or 271, however, it also must determine that the requirements of those two sections have been "fully implemented." 47 U.S.C. § 160(d).

The Commission may exercise its § 10 authority either on its own initiative or on a petition by a telecommunications carrier for forbearance from particular statutory or regulatory provisions. Section 10(c) provides that the Commission "may grant or deny a petition in whole or in part and shall explain its decision in writing." 47 U.S.C. § 160(c). Section 10(c) also provides that a forbearance petition "shall be deemed granted" after one year (plus 90

days if extended by the Commission) "if the Commission does not deny the petition for failure to meet the requirements for forbearance under [§ 10(a)]."

2. On June 21, 2004, Qwest filed a petition under § 10(c) seeking forbearance from its statutory obligations under 47 U.S.C. §§ 251(c) and 271(c)(2)(B)(i–vi) and (xiv) as applied to Qwest's "provision of telecommunications services in the Omaha, Nebraska Metropolitan Statistical Area (MSA)."[2] Qwest also requested forbearance from certain dominant carrier regulations, which apply to carriers that the Commission has determined have market power. *See* Forbearance Petition 1 (J.A. 135).

With respect to § 251(c), Qwest's petition sought forbearance from the duties imposed on "incumbent local exchange carriers" (or ILECs) to facilitate new entry by CLECs into local telephone markets. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Under § 251(c), CLECs can enter local phone markets in three ways: CLECs can obtain the ILEC's retail services at wholesale rates and resell those services to end users, they can interconnect their own equipment to the ILEC's network, and they can provide service using unbundled parts of the ILEC's network known as "unbundled network elements" or "UNEs." *See id.* at 371; *see also* 47 U.S.C. §§ 251(c)(2), (3), (4). Section 251(c) imposes three other obligations on ILECs to facilitate these entry options: ILECs must negotiate "in good faith" with CLECs seeking entry into the local market, ILECs must provide "reasonable public notice of changes" to their networks, and ILECs must allow CLECs to "collocat[e]" equipment "necessary for interconnection or access to unbundled network elements" on the ILECs' premises. *See* 47 U.S.C. §§ 251(c)(1), (5), (6).

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[2] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c), WC Docket No. 04–223, at 1 (Forbearance Petition) (J.A. 130).

In contrast to § 251(c), 47 U.S.C. § 271(c)(2)(B) applies only to Bell operating companies (BOCs). The 1996 Act replaced certain provisions of an antitrust decree, known as the Modification of Final Judgment (MFJ), that had kept the BOCs out of the long-distance market. *See AT&T Corp. v. FCC*, 220 F.3d 607, 611–612 (D.C. Cir. 2000) (citing 1996 Act, § 601(a)(1), 110 Stat. at 143). In place of those decree provisions, the 1996 Act adopted § 271. Under § 271, a BOC cannot provide service across the boundaries of "local access and transport areas"—geographic areas originally defined by the MFJ—until the FCC determines, on a state-by-state basis, that the BOC is providing competitors with access and interconnection to its local network consistent with the 14-point "competitive checklist" specified in § 271(c)(2)(B). *See* 47 U.S.C. § 271(d). Qwest has received interLATA authority for the states covered by the Omaha MSA and therefore is subject to the § 271 competitive checklist.

3. The Commission's Wireline Competition Bureau issued a public notice seeking comment on Qwest's forbearance petition,[3] adopted a protective order,[4] and later issued an order extending the deadline for action on the petition by 90 days, to September 16, 2005.[5] On that date, the Commission issued a news release announcing that it had voted to adopt the order on

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[3] *Pleading Cycle Established for Comments on Qwest's Petition for Forbearance in the Omaha Metropolitan Statistical Area*, 19 FCC Rcd 11374 (Wireline Competition Bur. 2004).

[4] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Protective Order, 19 FCC Rcd 11377 (Wireline Competition Bur. 2004).

[5] *Qwest Corporation's Petition for Forbearance in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 2531 (Wireline Competition Bur. 2005).

review.[6] On December 2, 2005, the Commission released the text of its order. The order, which the Commission made effective upon adoption, granted Qwest's forbearance petition in part and denied it in part.

The Commission granted Qwest's petition for forbearance from dominant-carrier regulation with respect to Qwest's mass-market services. Order ¶¶ 19, 25 (J.A. 62, 65). With respect to Qwest's enterprise services, the Commission concluded that the record evidence was insufficient to support forbearance from dominant-carrier regulation. Order ¶ 50 (J.A. 75–76). The petitioners in this case do not challenge the merits of this aspect of the Commission's order.

The Commission partially granted Qwest's request for forbearance from § 251(c). Under the Commission's § 251(c)(3) unbundling rules, Qwest had been required to provide CLECs access to its loops (*i.e.*, wires connecting telephones to telephone company switches) and transport facilities (*i.e.*, wires connecting calls between switches) in certain "wire centers" (*i.e.*, the parts of the ILEC's network where loops and transport facilities attach to the switch). The Commission relieved Qwest of this obligation in nine of Qwest's 24 wire centers in the Omaha MSA. Order ¶¶ 57 & n.149, 59 (J.A. 80, 81). The Commission concluded that, in areas served by those nine wire centers, Cox, the local cable operator, had built out "extensive facilities" and was using those facilities to provide service to mass-market and enterprise customers in competition with Qwest. Order ¶¶ 56, 66 (J.A. 79–80, 85–86). The Commission also found that many competitive carriers were using various wholesale services offered by Qwest to provide service to customers in areas served by those nine wire centers. Order ¶¶ 67–68 (J.A. 86–88). The

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[6] *FCC Grants Qwest Forbearance Relief in Omaha MSA*, News Release (Sept. 16, 2005) (J.A. 695).

Commission concluded that, notwithstanding its decision to forbear from § 251(c)(3), Qwest's other obligations under §§ 251(c) and 271, coupled with the competitive threat presented by Cox's rival network, would ensure the continued development of competition in the Omaha market. Order ¶¶ 68, 71, 73, 79–83 (J.A. 87–88, 90, 93–94). The Commission adopted a six-month transition period to give CLECs that had been using Qwest's § 251(c)(3) loops and transport time to make alternative arrangements. Order ¶ 74 (J.A. 91).

In granting Qwest partial forbearance from § 251(c) (and § 271[7]), the Commission held that these provisions had been "fully implemented" for purposes of § 10(d). The Commission noted that, in 47 U.S.C. § 251(d)(1), Congress had directed the Commission to "implement the requirements" of § 251(c) by "complet[ing] all actions necessary to establish regulations" within six months of the enactment of the 1996 Act. Order ¶ 53 (J.A. 77). The Commission concluded that the "fully implemented" condition in § 10(d) should likewise be construed to refer to the "rulemaking activities" by which the agency implements § 251(c). Order ¶ 53 & n.135 (J.A. 77–78). Because the Commission had promulgated rules to implement § 251(c)(3) and those rules had gone into effect, the Commission determined that the § 10(d) bar on the Commission's ability to consider the merits of Qwest's forbearance request no longer applied. Order ¶ 53 (J.A. 77).

Except as indicated above, the Commission concluded that the record evidence did not justify forbearance from §§ 251(c) or 271. As a result, Qwest

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[7] Consistent with its decision to forbear from applying § 251(c)(3), in the nine wire centers at issue, the Commission relieved Qwest of its obligations under checklist item 2 (which incorporates § 251(c)(3)) and forbore from the collocation requirement in § 251(c)(6) to the extent that it required Qwest to allow collocation for the purpose of accessing § 251(c)(3) network elements. Order ¶¶ 86, 93 (J.A. 95–97, 100).

remains subject to the duty to provide loops and transport under § 251(c)(3) in 15 wire centers in the Omaha MSA. Qwest also remains subject to the other provisions of § 251(c) and the § 271 checklist items (other than checklist item 2) throughout the Omaha MSA.

STANDARD OF REVIEW

Judicial review of the Commission's interpretation of the Communications Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if the intent of Congress is clear, then "the court, as well as the agency, must give effect to [that] unambiguously expressed intent." *Id.* at 842–843. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005).

Under the Administrative Procedure Act (APA), the Commission's analysis must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[T]he ultimate standard of review is a narrow one," and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Judicial deference to the Commission's "expert policy judgment" is especially appropriate where the "subject matter . . . is technical, complex, and

dynamic." *Brand X Internet Servs.*, 125 S. Ct. at 2712 (quoting *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)).

SUMMARY OF ARGUMENT

I. Qwest argues that the Commission lacked authority to issue the order on review because the Commission failed to take the necessary steps to deny its forbearance petition within the deadline set forth in § 10(c). This argument was never presented to the Commission and is therefore barred by the exhaustion requirement set forth in 47 U.S.C. § 405(a). In *In re Core Communications, Inc.*, 455 F.3d 267 (D.C. Cir. 2006), this Court applied § 405(a) to bar an essentially identical challenge to the denial of a forbearance petition. *Core* is controlling here and compels the dismissal of Qwest's petition.

Qwest suggests that its challenges fall within one of various "exceptions" to § 405(a), but none of these exceptions has any basis in the statutory text. In addition, Qwest's theories would have been equally applicable to the claims asserted in *Core*, so they provide no basis for distinguishing that case.

II. If the Court reaches the merits of Qwest's challenge, it should reject Qwest's argument that its forbearance petition was deemed granted. As the Court recognized in *Core*, § 10(c) does not unambiguously state what steps the Commission must take to "deny" a forbearance petition and, thereby, avoid a deemed grant. It is plainly reasonable to conclude that the Commission denied Qwest's petition when it voted to adopt the order. The Commission's news release, issued within the § 10(c) deadline, satisfies any obligation the Commission might have to provide notice of its forbearance determinations.

III. The Court should reject the CLECs' challenge to the Commission's decision to grant Qwest relief from the obligation to provide loops and

transport under § 251(c)(3) in the nine wire centers. The Commission reasonably concluded that § 251(c)(3) had been "fully implemented" and, therefore, that § 10(d) did not bar consideration of Qwest's forbearance request. The Commission reasonably interpreted the term "fully implemented" to refer to the agency's rulemaking activities to implement § 251(c), which were completed, for purposes of § 10(d), when the Commission's rules went into effect. The CLECs' challenges to the Commission's reasoning, to the extent not barred by § 405(a), are without merit.

The Commission's decision to forbear from loops-and-transport unbundling under § 251(c)(3) should be upheld. Substantial record evidence supported the Commission's conclusion that Qwest faced substantial facilities-based competition from Cox for both enterprise and residential customers in the geographic areas served by the nine Qwest wire centers at issue. The Commission also reasonably found, on the basis of record evidence, that competitors were successfully using Qwest's wholesale services to compete in the Omaha market and predicted that, in light of competitive pressure from Cox and Qwest's continuing regulatory obligations, Qwest would continue to offer wholesale services at reasonable rates and terms after it had received forbearance relief. Nothing in the *Triennial Review Remand Order*[8] conflicts with the Commission's forbearance analysis or its expert predictions about the effects of its forbearance decision on competition.[9]

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[8] *Unbundled Access to Network Elements*, 20 FCC Rcd 2533 (2005) (*TRRO*), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[9] The competition questions the Commission addressed in the order on review are part of the inquiry mandated by the Communications Act in section 10. Accordingly, the Commission's analysis is distinct from the market-definition standards and analyses of entry and competitive effects that the

ARGUMENT

I. QWEST'S CHALLENGE TO THE ORDER ON REVIEW IS BARRED UNDER 47 U.S.C. § 405(a)

Section 405(a) provides that the "filing of a petition for reconsideration" is a "condition precedent to judicial review" of any FCC order "where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." Under § 405(a), this Court "generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission." *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003).

In *In re Core Communications, Inc.*, 455 F.3d 267 (D.C. Cir. 2006), this Court applied § 405(a) to bar consideration of an argument essentially identical to that presented by Qwest. In *Core*, the Commission had voted to deny a petition for forbearance within the § 10(c) deadline, but it "issu[ed] a written order denying [the] petition" only after the deadline had passed. *Id.* at 275–276. Core argued that its petition "must be 'deemed granted' in full" because no order had issued by the deadline. *Id.* at 276. Because this argument had not first been presented to the Commission, the Court concluded that, under § 405(a), it lacked jurisdiction to consider it.

Core is binding precedent here, and it compels the rejection of Qwest's challenge to the forbearance order. Like the petitioner in *Core*, Qwest "failed to present the issue to the Commission in any form whatsoever." *Id.* at 276. To be sure, Qwest could not be certain that the "deemed granted" issue would arise. But as the Court explained in *Core*, "even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the

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Department of Justice applies in enforcing the antitrust laws, and they may lead to different results.

issue relevant," the petitioner still must file a petition for reconsideration with the Commission "before it may seek judicial review." *Id.* at 276–277. Since Qwest failed to do so, its claims are barred by § 405(a).

Qwest nonetheless argues that it can bypass the agency because it falls within an "exception" to § 405(a)'s exhaustion requirements. Its arguments find no support in the statute, and they are foreclosed by *Core*.

A. Qwest asserts (at 24) that § 405(a) does not apply because its challenge "is governed by *Chevron* step one." Section 405(a), however, applies to all "questions of . . . law," including questions with respect to which the Commission would not be entitled to deference.[10] Indeed, the Court has enforced § 405(a)'s requirements *more* strictly to claims of "obvious violation[s]" of law than to claims involving a "basic challenge to Commission policy." *Time Warner*, 144 F.3d at 81. Thus, although Qwest is correct (at 25) that courts do not defer to administrative agencies in deciding whether to apply *Chevron* step one or *Chevron* step two, that principle has no relevance to the inquiry under § 405(a), which embodies Congress's determination that all "questions of fact or law" be first presented to the Commission. In any event, Qwest's theory provides no basis for distinguishing *Core*. As we have explained, Qwest's argument—that the Commission did not take sufficient steps to "deny" its forbearance petition under § 10(c)—is essentially identical

[10] *See, e.g., Northwestern Indiana Tel. Co., Inc. v. FCC*, 824 F.2d 1205, 1210–11 n.8 (D.C. Cir. 1987) (constitutional argument barred by § 405(a)); *Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344, 349 & n.6 (D.C. Cir. 1998) (same); *Time Warner Entertainment Co., L.P. v. FCC*, 144 F.3d 75, 80 (D.C. Cir. 1998) (explaining that § 405(a) applies to APA-based challenges to agency action).

to the arguments made by Core.[11] *Core* holds that these arguments, like all other "questions of . . . law," are subject to § 405(a).

For similar reasons, Qwest errs in contending (at 26) that its argument falls within an exception to § 405(a) for "patently *ultra vires* agency action." The language of § 405(a) contains no *ultra vires* exception, and this Court has refused to create one. *See Northwest Airlines, Inc. v. FAA*, 14 F.3d 64, 73 (D.C. Cir. 1994) (a litigant's "failure to raise an issue [before the agency] will not be excused merely because the litigant couches its claim in terms of the agency's exceeding its statutorily-defined authority or 'jurisdiction.' ");[12] *accord BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 478 (D.C. Cir. 2006) ("[e]ven a defect in the jurisdiction of an agency" caused by failure to meet a statutory deadline "when not timely raised before that agency is forfeit."). But even if such an exception existed, it would not apply here, since the Commission's action was no more *ultra vires* than its identical action in *Core*.

B. Qwest also argues that § 405(a) is inapplicable because of the Commission's statements regarding the statutory question at issue in this case. Oddly, Qwest simultaneously maintains both that the Commission has

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[11] *See, e.g.*, Brief of Core Communications, Inc. (Core Br.) at 29, *In re Core Communications*, No. 04–1368 (D.C. Cir.) (Supp. Docs. 12) (the Commission must "take[] *all* the actions necessary to ascertain and determine the legal rights of the parties" by the § 10(c) deadline); *id.* at 24 (Supp. Docs. 7) (arguing that the news release did not "explain completely the FCC's decision"); *id.* at 25 (Supp. Docs. 8) ("The purpose of section 10 is for parties to understand their rights by a date certain"); *id.* at 26 (Supp. Docs. 9) ("But of course, backdating the effective date of an order addressing a forbearance petition is not permitted under the statute").

[12] *Northwest* repudiated the dicta on which Qwest relies to support its argument that there is an *ultra vires* exception to § 405(a). *See* Br. 26 (citing *Washington Ass'n for Tel. & Children v. FCC*, 712 F.2d 677, 681–682 & n.8 (D.C. Cir. 1983) (*WATCH*); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1170 (D.C. Cir. 1994)).

accepted its view of the statute by "recogniz[ing]" that it has an "obligation to make any denial effective by the statutory deadline to be consistent with Section 10" (Br. 25), and that the Commission has "made clear" its hostility to Qwest's position because "it simply does not want to be limited by Section 10(c)" (Br. 26). Neither of these assertions provides any basis for relieving Qwest from the effect of § 405(a).

Qwest's first claim—that "unlike in *Core*, the FCC *has* provided its official view on the statutory question before the Court" (Br. 25)—rests on a misreading of the Commission's order. In *Core*, the Court rejected Core's assertion that Commission precedent supported its reading of § 10(c), and it expressly declined to "be the first authority to construe the meaning" of § 10(c). 455 F.3d at 277.[13] Contrary to Qwest's contention, the effective-date provision in the order on review—a provision that is virtually identical to the one at issue in *Core*[14]—does not purport to interpret § 10(c), but simply states that an immediate effective date would be "[c]onsistent with Section 10," without elaborating on what § 10(c) requires. Order ¶ 112 & n.282 (J.A. 110). In any event, as we explain below, there is no exception to § 405(a) for legal questions that the Commission has previously resolved.

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[13] *See* Core Br. 20 n.2, 27–29 (Supp. Docs. 3, 10–12); Reply Brief of Core Communications, Inc. (Core Reply Br.) at 4, *In re Core Communications, Inc.*, No. 04–1368 (D.C. Cir.) (Supp. Docs. 15) (citing *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, 20 FCC Rcd 9361, 9368 ¶ 18 & n.49 (2005), *remanded*, *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006)); *see also* Core Reply Br. 5 n.2 (Supp. Docs. 16).

[14] *See Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179, 20189 ¶ 28 & n.74 (2004); *see also* Core Reply Br. 5 n.2 (Supp. Docs. 16).

Qwest's alternative theory—that its failure to exhaust should be excused because exhaustion would have been futile—is flawed for two independent reasons. First, there is no futility exception to § 405(a). To be sure, some of this Court's opinions, in seeking to harmonize § 405(a) and judicial exhaustion principles, have suggested that § 405(a) incorporates an exception for futility.[15] More recently, however, the Supreme Court has made clear that statutory exhaustion requirements are not subject to the traditional exceptions—such as futility—that apply to non-statutory exhaustion. Courts may not "read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001); *see also McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required.") (citation omitted). And this Court has recognized that when a statute mandates exhaustion, "a court cannot excuse it." *Avocados Plus, Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004); *accord Spinelli v. Goss*, 446 F.3d 159, 162 (D.C. Cir. 2006). Under these cases, the Court may not read a futility exception into § 405(a).[16]

Second, even if a futility exception were available, it would not help Qwest. The "futility exception is quite restricted and has been applied only

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[15] *See, e.g., Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997).

[16] Past decisions by this Court have found that § 405(a) incorporates a variety of common law exhaustion exceptions, *WSB, Inc. v. FCC*, 85 F.3d 695, 698 n.7 (D.C. Cir. 1996); *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 706–707 (D.C. Cir. 1985); *WATCH*, 712 F.2d at 681–682, but for reasons set out in the text, we submit that they have been overruled in this respect by the more recent Supreme Court decisions that require construing statutory exhaustion provisions like § 405(a) according to their terms.

when resort to administrative remedies is clearly useless." *Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 157 (D.C. Cir. 2006) (internal punctuation and citations omitted). Even if "an unfavorable decision" by the agency is "*highly likely*," "that does not satisfy [the] strict futility standard requiring a *certainty* of an adverse decision." *Id.* (emphasis in original); *accord National Science & Technology Network, Inc. v. FCC*, 397 F.3d 1013, 1014 (D.C. Cir. 2005) ("Failure to pursue administrative remedies will be excused for futility only upon a showing that an adverse decision was a certainty").

Qwest has failed to show that an adverse agency decision on reconsideration would be "certain[]." *Boivin*, 446 F.3d at 157. It observes (at 26) that the Commission's action on a petition for reconsideration would not be subject to a statutory deadline, but that has no bearing on whether the Commission's decision on reconsideration is certain to be adverse to Qwest. Indeed, in *Core*, the Court required exhaustion notwithstanding Core's assertion that "reconsideration clearly would serve only to delay even further resolution of Core's rights." Core Reply Br. 20 n.10 (Supp. Docs. 17).

Qwest also relies on cases in which this Court remanded forbearance decisions to the Commission, but those cases involved issues that are unrelated to the arguments Qwest seeks to raise. *See* Br. 26–27. In the two *AT&T* cases, the Court remanded because it concluded that the Commission had misinterpreted the scope of its discretion not to consider the merits of a forbearance petition under § 10(a).[17] And in *Verizon*, the Court remanded a

[17] *See AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) ("the availability of . . . an alternative route for seeking pricing flexibility does not diminish the Commission's responsibility to fully consider petitions under § 10"); *AT&T Inc.*, 452 F.3d at 835 (stating that the Commission could not automatically regard "*all* conditional forbearance requests" as "contrary to the public interest" under § 10(a)(3)).

forbearance decision for lack of reasoned decisionmaking under the APA.[18] In contrast, Qwest does not attack the Commission's reasoning; it challenges the Commission's authority to issue the order. Because the *AT&T* decisions and *Verizon* do not address this issue, they provide no support to Qwest's claim of futility.

Finally, Qwest argues (at 27) that an adverse agency decision is certain because "the FCC was well aware that there were questions concerning its ability to release a decision after the statutory deadline," and it addressed those questions by making its order effective on adoption. Of course, much the same thing could have been said in *Core*, but that did not excuse Core's failure to exhaust. More fundamentally, it is irrelevant whether the Commission was "aware" of legal issues that *could* have been raised. Under established law, the petitioner "has the burden of clarifying its position before the agency," and therefore, must "assume[] at least a modicum of responsibility for flagging the relevant issues" in the agency proceeding under review.[19] Qwest's failure to "flag[] the relevant issues" before the agency precludes it, under § 405(a), from raising those issues now.

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[18] *Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1232 (D.C. Cir. 2004) ("The significant question, therefore, is not whether the Commission violated the statutory deadline, but whether, as Verizon also argues, the Commission's explanation for denying Verizon's petition was inadequate").

[19] *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 279–280 (D.C. Cir. 1997) (internal quotation marks omitted); *see also American Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1178 (D.C. Cir. 1995) ("That an agency *at one time* considers and rejects certain arguments does not mean that the agency can thereafter by bypassed."); *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 39 (D.C. Cir. 2006) ("we see no reason the Commission should be required to sift through pleadings in other proceedings in search of issues that a petitioner raised elsewhere and might have raised here had it thought to do so") (quoting *Beehive Tel. Co., Inc. v. FCC*, 179 F.3d 941, 945 (D.C. Cir. 1999)).

II. IF THE COURT DOES REACH THE MERITS, IT SHOULD REJECT QWEST'S ARGUMENT THAT § 10(c) UNAMBIGUOUSLY RENDERS THE COMMISSION'S ACTIONS TO DENY QWEST'S FORBEARANCE PETITION UNTIMELY

Section 10(c) provides that a forbearance petition "shall be deemed granted if the Commission does not *deny* the petition" within the statutory deadline. 47 U.S.C. § 160(c) (emphasis added). As the Court recognized in *Core*, 455 F.3d at 276, § 10(c) does not specify what steps the Commission must take to "deny" a forbearance petition. In light of this statutory ambiguity, it is reasonable to conclude that the Commission's publicly-announced vote to adopt the order on review within the statutory deadline satisfied § 10(c).

A. As Qwest observes (at 16), the word "deny" means "to refuse to grant." Webster's Third New International Dictionary of the English Language Unabridged 603 (1965). As a matter of common usage, it would be perfectly natural to say that the Commission "refused to grant" Qwest's forbearance petition when it voted to deny that petition (in part). Indeed, courts have repeatedly referred to voting when describing the means by which regulatory commissions take official action.[20]

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[20] *See FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 185–186 n.9 (1967) (noting that the FCC and other agencies "*act* on the majority *vote* of a quorum") (emphasis added); *WIBC, Inc. v. FCC*, 259 F.2d 941, 943 (D.C. Cir.) (the FCC "may act . . . only on the vote of a majority of those present"), *cert. denied*, 358 U.S. 920 (1958); *Greater Boston Tele. Corp. v. FCC*, 444 F.2d 841, 861 (D.C. Cir. 1970) ("the Commission may act . . . by a vote of a majority of those present"), *cert. denied*, 403 U.S. 923 (1971); *Federal Broad. Sys., Inc. v. FCC*, 225 F.2d 560, 565 (D.C. Cir.) ("the action in question was taken by majority vote of the Commissioners present and voting"), *cert. denied*, 350 U.S. 923 (1955); *Public Serv. Comm'n of N.Y. v. Federal Power Comm'n*, 543 F.2d 757, 776 (D.C. Cir. 1974) (stating that it is the agency's "institutional decision[]," which "mean[s], of course, a decision by a majority vote duly taken," that "bear[s] legal significance").

Moreover, the language of § 10(c), viewed in light of longstanding Commission practice, supports interpreting the word "deny" to refer to the Commission's timely vote. The final sentence of § 10(c) provides that "[t]he Commission may *grant* or *deny* a petition in whole or in part and shall explain its *decision* in *writing*." 47 U.S.C. § 160(c) (emphases added). In this sentence, the term "its decision" refers to the Commission's decision to "grant" or "deny" a forbearance petition, while the "writing" refers to the document that embodies the "decision." For over three decades, the Commission has routinely marked its orders with two relevant dates: the date of adoption (*i.e.*, when the Commission votes to approve a proposed order) and the date of release. Given this historical practice, it is reasonable to conclude that the Commission "denies" a forbearance petition, for purposes of the last sentence of § 10(c), when it decides by majority vote to adopt a denial order within the statutory deadline, and that it fulfills the separate statutory requirement that it explain its decision in writing when it releases its adopted order.[21] Under this interpretation, the Commission's timely vote to adopt the order on review was sufficient to "deny" Qwest's forbearance petition and avoid a deemed grant.

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[21] In light of the longstanding FCC practice of distinguishing the dates of adoption and release of agency orders, Qwest's reliance (at 20) on cases discussing when an agency's decision has been "issued" or "promulgated" is misplaced. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 676 (1950) ("issued"); *Horsehead Resources Development Co. v. EPA*, 130 F.3d 1090, 1093 (D.C. Cir. 1997) ("promulgated"). Relatedly, *Industrial Union Dep't, AFL-CIO v. Bingham*, 570 F.2d 965 (D.C. Cir. 1977) (Leventhal, J., concurring), concerned the time for seeking judicial review of agency decisions, a question that Judge Leventhal recognized "implicates somewhat different considerations" from questions "concerning the validity *vel non* of an order." *Id.* at 969 n.6.

B. Qwest concedes that § 10(c) does not establish a deadline by which the Commission must release the full text of a denial order. Br. 18, 21. As several intervening ILECs, including Qwest, observed in *Core*, "[t]he statute itself says nothing about the procedures the FCC must use to 'deny' a petition within the statutory time frame"; and, because "the FCC makes decisions by voting," the "mere fact that it released the [o]rder seven days after the end of the statutory period does not result in Core's petition being deemed granted." Brief of ILEC Intervenors at 4–5, *In re Core Communications, Inc.*, No. 04–1368 (D.C. Cir.) (Supp. Docs. 19–20). Qwest contends, however, that § 10(c) does unambiguously require that the Commission's vote be made "legally effective" within the statutory deadline. Br. 21. In Qwest's view, this means that, within the statutory deadline, the Commission must give notice of "how [it] has ruled on all of the requests for forbearance" and when the adopted order will be effective. Br. 21.

Because automatic-grant statutes impose a "dramatic, even extreme, penalty for agency delay," this Court has declined to apply this "radical remedy" unless mandated by the statutory text. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). Qwest's claim that § 10(c) requires both a timely denial of a forbearance petition and a timely detailed notice of the denial does not meet this standard. Congress took care in § 10(c) to impose very specific obligations on the Commission: a "denial" within the statutory deadline (to prevent a deemed grant) and a "writing" explaining that decision. If Congress had intended to make lack of a detailed "notice" a basis for a deemed grant, it could have easily said so. *See Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 824 F.2d 1146, 1153 (D.C. Cir. 1987); *Planned Parenthood Fed. of Am., Inc. v. Heckler*, 712 F.2d 650, 656 (D.C. Cir. 1983).

In any event, the Commission's news release, issued the same day it voted on Qwest's forbearance petition, gave Qwest actual notice of the Commission's forbearance determinations within the statutory deadline, and therefore satisfied any such obligation. *See* J.A. 695. The news release discloses that Qwest received forbearance relief from § 251(c)(3) unbundling requirements "in 9 of Qwest's 24 wire center service areas" where "intermodal deployment is extensive." Although Qwest complains (at 19) that the Commission "did not identify the areas" involved until it released the order, *see* Order n.155 (J.A. 82), nothing prevented Qwest from asking the Commission for that information, especially since that information was in the record and available to its counsel under the agency's protective order. *See* Letter from J.G. Harrington, Dow, Lohnes & Albertson, PLLC, to Marlene H. Dortch, Secretary, FCC (June 30, 2005) (Cox June 30 Letter), at 2 (J.A. 671). The news release also informed Qwest that the Commission denied forbearance with respect to "other section 251(c) requirements . . . as well as section 271 obligations to provide wholesale access to local loops, local transport, and local switching at just and reasonable prices." Qwest therefore has no basis for claiming lack of notice as to those denials. The news release further states that Qwest received forbearance relief from dominant-carrier regulation for "mass-market services," implicitly informing Qwest that it had not received forbearance from dominant-carrier regulation in the enterprise market.

The news release also gives specific notice of the six-month transition period for existing customers of Qwest's § 251(c)(3) network elements. Although the release did not expressly state that the transition period had begun with the Commission's adoption of the order, Qwest is in no position to complain about that: the immediate start date redounds solely to Qwest's benefit because it means that the transition will end sooner. In any event,

from its participation in the *Core* proceeding and subsequent litigation, Qwest surely was aware that the Commission might make its forbearance decision in this case effective upon adoption. *See Addition of New Section 1.103 to the Commission's Rules of Practice and Procedures*, 85 FCC 2d 618, 620 ¶ 7 (1981) (*Effective Date Order*) (noting that "parties often act in reliance upon a final action by the Commission" where "the Commission has affirmatively designated an earlier effective date or the parties have *reasonably assumed* its existence") (emphasis added).

C. Qwest is also wrong in asserting (at 19) that the Commission regards its vote as "tentative until it has been finalized." In the *Effective Date Order*, on which Qwest relies, the Commission determined that, as a general rule, the effective date of a decision should be the date of "public notice" of the decision. 85 FCC 2d at 629 (adopting 47 C.F.R. § 1.103). But, in doing so, the Commission was careful to note that the effective date of Commission action was legally distinct from the public notice date. *Id.* at 619 ¶ 6 ("Clearly, these two dates have separate significance."). Consistent with that view, the Commission expressly reserved its authority to make its decisions effective on adoption. *Id.* at 620 ¶ 8; *see also* § 1.103(a) (providing that the Commission can specify an effective date that is earlier or later than the date of public notice).[22]

[22] Qwest (at 19 n.12) cites a situation described in the *Effective Date Order*, 85 FCC 2d at 625–626 ¶ 21, in which the Commission reconsidered its decision in an adopted order that was not released and, as a result, adopted and released a different order. In that "extreme case" (*id.*), however, the order that was released bore the accurate adoption date, not the adoption date of the order that was not released. *See The Associated Press*, 72 FCC 2d 760 (1979). The order on review here likewise bears an accurate adoption date, and that date falls within the § 10(c) deadline. Nor can Qwest complain (at 19 n.12) about the possibility of "editorial revisions" to the order, given that it disclaims any argument that the Commission was required to release the full text of the order within the § 10(c) deadline.

This reservation of authority would make little sense if the Commission regarded its votes as merely "tentative."[23]

The order on review was also "legally effective" inasmuch as the Commission exercised its authority under § 1.103(a) to make the order effective upon adoption. Order ¶ 112 & n.282 (J.A. 110). Qwest complains (at 21) that the Commission's exercise of authority under § 1.103(a) was invalid because it did not "give those affected" notice of the effective date. Nothing in § 1.103(a), however, requires such notice. To the contrary, when the Commission adopted § 1.103(a), it made clear that "the timing of the release" of an effective-date designation "will not affect the designated effective date," such that "if the Commission delays in issuing its order designating an earlier effective date, such delay will not cause the effective date to be changed." *Effective Date Order*, 85 FCC 2d at 620 n.2.[24] Nor is there any basis for Qwest's assertion (at 16) that the Commission recognized the "need[]" to make the order effective on adoption of the order to satisfy the statutory deadline. As discussed above, *see supra* p.15, the Commission stated that making the order immediately effective is "[c]onsistent with"—not required by—section 10. Order ¶ 112 & n.282; *cf. City of New Orleans v. SEC*, 969 F.2d 1163, 1168

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[23] *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994), is not to the contrary. There, the Court was faced with allegations of agency impropriety on the basis of news reports that some SEC commissioners had "voted" in favor of petitioners, but that the SEC Chairman had refused to "process" that vote. *Id.* at 487. In the course of rejecting petitioners' appeal of denial of discovery into privileged SEC deliberations, the Court noted that the SEC "vote" reported in the media was "tentative" and not "final." *Id.* at 489–490. Here, there is no dispute that all sitting members of the Commisson voted on the order on review, and that the voting was completed within the § 10(c) deadline.

[24] Contrary to Qwest's suggestion (at 21 n.13), 5 U.S.C. §§ 552(a)(2) and 555(e) do not address the effective date of agency decisions.

(D.C. Cir. 1992) (explaining that an interpretation "consistent with the words" of the statute "is by no means [a] required one").

Qwest protests that it cannot "begin to exercise private rights" or "comply with obligations imposed" unless it has notice of the effective date of the Commission's order (and the underlying decision). Br. 19 (quoting *Effective Date Order*, 85 FCC 2d at 619 ¶ 6). But the Commission's partial "denial" of Qwest's forbearance petition under § 10(c) merely preserved the status quo; it did not grant any "private rights" or impose any new "obligations" on Qwest. And although the Commission's grant of forbearance relief to Qwest did confer a benefit on Qwest, Qwest provides no basis for concluding that a "legally effective" *denial* under § 10(c) unambiguously requires the Commission to give timely and detailed notice of its decision to *grant* a forbearance petition.

D. Contrary to Qwest's hyperbole (at 17–18), the Commission's action here would not "gut the statute." This Court has observed that the purpose of § 10(c) "is to force the Commission to act within the statutory deadline." *AT&T Inc.*, 452 F.3d at 836. That purpose would be served if, to prevent a deemed grant, the Commission must vote on a forbearance request by a date certain, an obligation the Commission otherwise would not have.

Qwest posits that the Commission "could wait as long as it wished"—"even years"—to release an adopted forbearance order. Br. 23. Here, however, the Commission fully and promptly disclosed in a news release both the fact that it voted and the results of that vote. *See*, *supra*, pp. 22–23. And the Commission is under a continuing obligation to avoid unreasonable delay. If it fails to release an order within a reasonable time, a party could seek a writ of mandamus to compel it to act. *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984). In these circumstances, the "radical remedy" of a deemed grant is not justified by the hypothetical scenarios that

Qwest envisions. *Ethyl Corp.*, 989 F.2d at 524; *see also PDK Labs., Inc. v. United States Drug Enforcement Admin.*, 438 F.3d 1184, 1192 (D.C. Cir. 2006) ("Without more, the theoretical possibility that an agency might someday abuse its authority is of limited relevance in determining whether [a particular] interpretation of a congressional delegation is reasonable.").

III. THE CLECS' CHALLENGE TO THE GRANT OF QWEST'S FORBEARANCE PETITION SHOULD BE REJECTED

The CLECs challenge the order on review on two grounds. First, they contend that the Commission acted unreasonably when it concluded that § 251(c) had been "fully implemented" for purposes of § 10(d). Second, they challenge the Commission's decision to forbear from loops-and-transport unbundling under § 251(c)(3). Neither of these arguments withstands scrutiny.

A. The Commission Reasonably Concluded That § 251(c) Had Been Fully Implemented

Section 10(d) provides that the Commission "may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). The Commission concluded that § 251(c) had been fully implemented because the agency "ha[d] issued rules implementing section 251(c) and those rules ha[d] gone into effect." Order ¶ 53 (J.A. 77).[25] The Commission noted that this reading of § 10(d) was consistent with the language of § 251(d)(1), which directed the Commission to "implement" § 251(c) by promulgating regulations within six months of the enactment of the 1996 Act. 47 U.S.C. § 251(d)(1).

[25] The CLECs do not challenge the Commission's conclusion that § 271 has been fully implemented. *See* Order ¶ 52 (J.A. 76–77).

The CLECs argue (at 37) that the Commission's interpretation of § 10(d) is inconsistent with its 1996 *Local Competition Order*.[26] This argument is barred under § 405(a) because the CLECs did not discuss the *Local Competition Order* in their arguments to the Commission. *See Cellco Partnership v. FCC*, 357 F.3d 88, 102 (D.C. Cir. 2004) (the petitioner "never argued to the Commission that its decision [under review] was inconsistent with its [prior] decision . . ., and hence [under § 405(a)] it cannot now argue that the Commission erred by failing to reconcile these two decisions").

In any event, there is no inconsistency. According to the CLECs, the *Local Competition Order* recognized that the states and the ILECs play a role in "implementing" § 251(c). The Commission, however, did not purport to interpret § 10(d) in the *Local Competition Order*, nor did it discuss the states' responsibilities under the 1996 Act with reference to either § 251(d) or § 10. To the contrary, the portions of the *Local Competition Order* the CLECs rely on highlight the Commission's understanding of its responsibilities to implement the provisions of § 251(c).[27]

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[26] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *aff'd in part and vacated in part*, *Iowa Utils. Bd.*, 525 U.S. 366.

[27] *See Local Competition Order*, 11 FCC Rcd at 15520 ¶ 41 ("In implementing section 251, we conclude that some national rules are necessary," and that "the rules we establish call on the states to exercise significant discretion"); *id.* at 15527 ¶ 53 ("the FCC establishes uniform, national rules for some issues, the states and the FCC administer these rules"); *id.* at 15531 ¶ 60 (emphasizing "the broad delegation of authority that Congress gave the Commission to implement the requirements set forth in section 251"); *id.* at 15545 ¶ 85 (explaining that the FCC is required "to establish implementing rules to govern . . . access to unbundled network elements" and the states are directed "to follow the Act and those rules" in arbitrating and approving interconnection agreements); *id.* at 15557–58 ¶ 111 ("The Commission is also responsible for ensuring that . . . access to unbundled [network] elements [is] reasonably available to new entrants," while the states' role "is to establish

Relatedly, the CLECs' reliance (at 39) on the Commission's statement in the *Local Competition Order* that it had "beg[un] to implement sections 251 and 252" is misplaced. *See* 11 FCC Rcd at 15507 ¶ 6. That statement does not interpret § 10(d), but refers to the Commission's willingness to revisit its rules as competition develops. In the order on review, the Commission considered whether it should interpret the term "fully implemented" to require unbundling rules that were "permanent," but it reasonably rejected that reading because "such an interpretation would render § 10(a) a nullity." Order ¶ 56 (J.A. 79).

The CLECs also contend (at 40) that the ILECs "have a very substantial role in implementing Section 251(c), namely fulfilling the duties imposed by that section." The Commission reasonably determined, however, that ILECs "are not properly said to be implementing" § 251(c) merely because they "*comply* with section 251(c)." Order ¶ 53 (J.A. 77). Just as one does not typically say that an individual "implements" the Internal Revenue Code by complying with the duty to pay taxes, the Commission could conclude that an ILEC that complies with § 251(c) does not thereby "implement" its provisions for purposes of § 10(d).

The CLECs also find it "improbable" that Congress intended that the FCC could forbear from application of section 251(c)'s requirements before the benefits of § 251(c)(3) unbundling could be "significantly realized." Br. 42. That argument fails because the Commission cannot forbear solely on a finding of full implementation; it also must find that the § 10(a) forbearance

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specific rates . . ., consistent with the regulations prescribed by the Commission"); *id.* at 15560 ¶ 116 (emphasizing the requirement in § 252(c)(1) that the states follow the FCC's rules implementing § 251 when they conduct arbitration proceedings under § 252).

criteria have been met. Moreover, the Commission considers "competitive market conditions" as part of its forbearance inquiry under § 10(a). The Commission reasonably declined to interpret the "fully implemented" condition in § 10(d) to require a "duplicative" competitive analysis. Order ¶ 55 (J.A. 79).

Finally, the CLECs argue (at 41) that the term "fully implemented" in § 10(d) "must mean more than merely the establishment of rules 'to implement' Section 251" because "fully" means "totally or completely." But the Commission explained that "section 251(c) [was] fully implemented once the Commission . . . completed its work of promulgating rules implementing section 251(c) *and* those rules [had] taken effect." Order n.135 (J.A. 77) (emphasis added). The Commission's interpretation thus gives the word "fully" a role to play in § 10(d).[28]

B. The Commission Reasonably Found, On The Basis Of Substantial Record Evidence, That Forbearance From Loops-And-Transport Unbundling Under § 251(c)(3) Was Warranted

The Commission granted Qwest's request for forbearance from the obligation to provide loops and transport to competitors under § 251(c)(3) "in nine of Qwest's 24 wire centers in the Omaha MSA where competitive deployment is greatest." Order ¶ 59 (J.A. 81). With respect to those wire centers, the Commission observed that Cox, through its own facilities, was

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[28] The CLECs also rely on a statement in *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001) (*ASCENT*), that § 251(c) "ha[d] not been fully implemented." That statement is dicta. The FCC did not purport to invoke its forbearance authority in that case or defend its decision under § 10. *See id.* In light of § 10(d)'s clear statement that the Commission is responsible for making the "fully implemented" determination, the Commission correctly observed that *ASCENT*, read properly, simply "referred to the fact that the Commission had not yet found that the requirements of section 251(c) were fully implemented." Order n.133 (J.A. 77).

providing "sufficient facilities-based competition" to Qwest to justify forbearance relief, particularly given that other competition-promoting provisions of the Act—including the parts of § 251(c) and the § 271 competitive checklist from which the Commission did not forbear—would continue to apply. Order ¶ 64 (J.A. 85). For similar reasons, the Commission reasonably concluded, under § 10(a)(2), that loops-and-transport unbundling in the nine wire centers was not necessary to protect consumers, subject to a transition plan to enable existing users of Qwest's § 251(c)(3) network elements to make alternative arrangements. Order ¶¶ 73–74 (J.A. 90–91).

The CLECs present several challenges to the FCC's forbearance analysis, but none withstands scrutiny.

1. The CLECs challenge the Commission's decision to forbear from § 251(c)(3) with respect to high-capacity loops in the enterprise market. Specifically, under the § 251(c)(3) unbundling rules adopted in the *Triennial Review Remand Order* (or *TRRO*), Qwest was required to unbundle "DS1" loops (which carry 24 voice-grade (or DS0) channels) and "DS3" loops (which carry 28 DS1 channels) in wire centers that meet certain impairment tests.[29] The CLECs argue that the record in the *TRRO* proceeding "contained little evidence that cable companies were providing service at DS1 or higher capacities," and they assert that "[n]othing in the record here distinguished

[29] 47 C.F.R. § 51.319(a)(4), (5); *TRRO*, 20 FCC Rcd at 2614 ¶ 146. Qwest did not have to unbundle "OC*n*" loops that have a capacity greater than DS3. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17168 ¶ 315 (2003), *aff'd in part and rev'd in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004); *see also id.* at 17211 n.1154 (summarizing the different levels of loop and transport capacities).

Cox's competitive footprint as a cable operator in the Omaha MSA." Br. 32–33. They are mistaken.

Cox's own filings in the agency proceeding show that it is a significant provider of high-capacity loops to enterprise customers. Cox asserted below that it "currently has the capability of using its own facilities to serve approximately [redacted] of the [redacted] customers in its service area that potentially could purchase service at the DS-1 level or higher," and, further, that it could "provide service up to the OC*n* level to each of these customers."[30] These figures are based on Cox's entire service area in the Omaha MSA. With respect to the area served by the nine wire centers, Cox estimated that its facilities reached [redacted] percent of business locations.[31] The record also shows that, within that more limited area, Cox served approximately [redacted] business customers, providing them with [redacted] DS1 circuits, [redacted] DS3 circuits, and [redacted] OC*n* circuits (as well as [redacted] DS0 lines). Cox Sept. 16 Letter, Att. (J.A. 694); *see also* Order ¶ 69 (J.A. 88–89). [redacted], which provided retail customers served by the nine wire centers with [redacted] DS1, [redacted] DS3, and [redacted] OC*n* lines, they support the Commission's conclusion that Cox "has succeeded in attracting a large number of significant Omaha

[30] Letter from J.G. Harrington, Dow, Lohnes & Albertson, PLLC, to Marlene H. Dortch, Secretary, FCC (Aug. 22, 2005), Att. (J.A. 678).

[31] Letter from J.G. Harrington, Dow, Lohnes & Albertson, PLLC, to Marlene H. Dortch, Secretary, FCC (Sept. 16, 2005) (Cox Sept. 16 Letter), Att. (J.A. 694). The CLECs emphasize Cox's statement that it reaches [redacted] of potential enterprise customers with its own facilities. Br. 33–34. But that statement refers to Cox's reach for the entire Omaha MSA. Letter from J.G. Harrington, Dow, Lohnes & Albertson, PLLC, to Marlene H. Dortch, Secretary, FCC (Sept. 14, 2005), Att. at 2 (J.A. 683). As noted in the text, the record shows that Cox reaches [redacted] business customers in areas served by the nine wire centers for which Qwest received forbearance relief.

businesses as customers." Order ¶ 66 (J.A. 86). Although the CLECs complain (at 32–33) that the record in the *TRRO* proceeding would not have supported the Commission's findings about Cox's provision of high-capacity loops, the record evidence in this proceeding clearly does.

The Commission also predicted that Cox's presence in the enterprise market would continue to grow. The Commission noted that the enterprise market offered a higher "revenue potential" than the residential market, in which Cox already had obtained [redacted] in the Omaha MSA. Order ¶ 66 (J.A. 86). The Commission also found that Cox is "actively marketing itself to enterprise customers" and has "doubled its enterprise sales in the Omaha MSA each year for five consecutive years." *Id.* Cox also has the "necessary facilities," the "technical expertise," the "economies of scale and scope," the "sunk investments in network infrastructure," and the "established presence and brand in the Omaha MSA" to pose a "substantial competitive threat" to Qwest. *Id.* And, as already discussed, Cox has already garnered a sizable base of enterprise customers to which it is providing high-capacity loops. Order ¶ 69 (J.A. 89).

The CLECs challenge (at 33–35) the Commission's predictions, but they cannot overcome the "particularly deferential review" that governs the Commission's predictive judgments. *Earthlink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) (emphasis removed); *see also Core*, 455 F.3d at 282. First, though the CLECs recognize that Cox's advertising shows "its willingness to serve enterprise customers," they say that advertising "does not indicate the extent to which Cox has [deployed] or can deploy its own facilities." Br. 33. But the Commission separately took account of where Cox had deployed facilities (and would likely deploy new facilities), which is why the Commission limited its grant of forbearance to nine of Qwest's 24 wire centers

in the Omaha MSA. *See* Order ¶ 69 (J.A. 89). Second, although the CLECs complain (at 33) that the Commission did not "analyze Cox's actual retail market share," the Commission in fact considered Cox's existing retail offerings of high-capacity loops and its existing and potential ability to serve customers in areas served by those nine wire centers. Order ¶¶ 66 & n.174, 69 (J.A. 86, 88–89). Finally, the CLECs contest (at 34) the Commission's reliance on Cox's "technical expertise" because, they contend, technical expertise alone does not make "construct[ing] loops to businesses" economic. But Cox's expertise surely contributes to its ability to compete in the enterprise market, and the fact that Cox is *actually* offering high-capacity loops to enterprise customers in the Omaha MSA suggests that the Commission's recognition of Cox's technical expertise, as well as its prediction about Cox's ability to compete with Qwest in the enterprise market, was well founded.

2. The Commission limited the scope of forbearance relief to the nine wire centers "where competitive deployment is greatest." Order ¶ 59 (J.A. 81). The Commission explained that, in each of the areas served by these nine wire centers, [redacted] percent of "end user locations" could be reached by Cox's existing network. Order ¶ 69 (J.A. 88). The Commission reasonably concluded that, because Qwest cannot "discern exactly where its facilities-based competitors are capable of providing service," Cox's ability to cover as much as [redacted] percent of all end-user locations served by a wire center "will ensure that *all* of the customers" served by those wire centers will benefit from Cox's competitive presence. Order ¶ 69 (J.A. 89) (emphasis added); *see also* Order n.187 (J.A. 89). The Commission further predicted that the areas served by the nine wire centers, which had already spurred the highest level of facilities-based competition in the Omaha MSA, would likely experience "further investment

and deployment by Cox." Order ¶ 69 (J.A. 89); *see also* Order ¶ 66 (J.A. 85–86) (discussing Cox's presence in the enterprise market).

The CLECs contend that because Cox's network reaches [redacted] percent of business customers located in the areas served by the nine wire centers, the Commission did not apply the "stated threshold of [redacted] percent" to the enterprise market. Br. 30. In the same vein, the CLECs contend that the Commission "deviated, without explanation or justification, from its wire center-by-wire center analysis" in the enterprise market. Br. 30.

The CLECs are incorrect when they claim that the Commission applied different network-coverage standards for the mass market and the enterprise market. The Commission's [redacted] percent threshold was based on Cox's own estimate about the extent to which its network covered locations served by Qwest's wire centers. Cox June 30 Letter 2 (J.A. 672).[32] In providing this information, Cox did not distinguish between residential and enterprise lines. *See id.* at 3 (J.A. 673). Cox later supplemented its figures by estimating that, for areas served by these nine wire centers, its facilities could reach [redacted] percent of business locations. Cox Sept. 16 Letter, Att. (J.A. 694). But, contrary to the CLECs' suggestion (at 31), Cox did not break down its coverage of business locations on a wire-center-by-wire center basis. On the basis of this record, the Commission determined that Qwest was entitled to relief from § 251(c)(3) for those wire centers where Cox's network could reach [redacted] percent of "end user locations," a term that includes both residential and business customers. Order ¶¶ 60 n.155, 62, 69 & n.187 (J.A. 82, 83, 88, 89). The FCC's judgment

[32] These figures exclude "multiple tenant environments" to which Cox does not have access. Order n.155 (J.A. 82). The Commission accepted Cox's assertion that including such locations would not have had "a material effect on its coverage estimates." *Id.* The CLECs do not contest that finding.

on matters involving a "high level of technical expertise" is entitled to substantial deference. *Earthlink*, 462 F.3d at 9 (internal quotation marks omitted).

3. In granting Qwest relief from loops-and-transport unbundling under § 251(c)(3), the Commission determined that, in addition to Cox's "own extensive facilities" (Order ¶ 59 (J.A. 81)), the Omaha MSA was characterized by substantial competition from providers using "Qwest's wholesale inputs." Order ¶ 68 (J.A. 88). These wholesale inputs are offered in a variety of ways, including tariffed DS1 and DS3 offerings (known as "special access"), facilities that Qwest must make available under checklist items 4 through 6, resale of Qwest's retail services under § 251(c)(4), and Qwest Platform Plus (QPP), a commercially negotiated wholesale service that integrates loops, switching, and transport into a single package. *See* Order ¶¶ 29 n.82, 67, 68 (J.A. 67, 86–88).

The CLECs do not dispute that competitors use Qwest's wholesale offerings to compete in the enterprise market. They nonetheless contend that the Commission should have disregarded this competition in its forbearance analysis because, when the Commission concluded in the *TRRO* that ILECs must unbundle DS1 and DS3 loops and transport under § 251(c)(3), it did so without regard to the ILECs' tariffed offerings. *See* Br. 20–28. The Commission reasonably rejected the CLECs' arguments. *See* Order ¶ 63, n.177 (J.A. 84, 86–87).

In the *TRRO*, the Commission recognized that an ILEC's tariffed offerings could, in some circumstances, be an avenue for competitive entry. *See, e.g.*, *TRRO*, 20 FCC Rcd at 2561 ¶ 48 ("a carrier could, in theory, use [a] tariffed offering to enter a market"). For example, the Commission found that "carriers have successfully used special access to compete" in the wireless and

long-distance markets and that "competition [in those markets] has evolved without access to UNEs." *Id.* at 2554 ¶ 36, 2560 ¶ 46. The Commission accordingly concluded that ILECs did not have to provide wireless and long-distance carriers access to unbundled network elements under § 251(c)(3). "Where a requesting carrier seeks access to a UNE in order to provide a telecommunications service where competition has evolved without access to such a UNE," the Commission explained, "the costs . . . of unbundling that UNE outweigh the benefits of unbundling, even if some level of impairment might be present." *Id.* at 2555 ¶ 37.

With respect to the local-exchange market, however, the Commission concluded that "the availability of a tariffed alternative should not *foreclose* unbundled access" to a network element under § 251(c)(3). 20 FCC Rcd at 2561 ¶ 48 (emphasis added); *see also Covad*, 450 F.3d at 539 (holding that the Commission "provided a reasoned explanation for its decision not to eliminate unbundling *solely* on the basis of limited" special-access competition) (emphasis added). The Commission explained that, in general, competition in the local-exchange market was less established than in the wireless and long-distance markets, and it relied to a greater extent on the availability of § 251(c)(3) network elements. *TRRO*, 20 FCC Rcd at 2556 ¶ 38, 2569–70 ¶ 62, 2572–74 ¶ 64. In these circumstances, the Commission reasoned, "a rule barring access [to UNEs] whenever competitors could operate using [the ILEC's] tariffed alternatives" could give the ILEC too much control over the development of competition in the local-exchange market. *Id.* at 2575 ¶ 65; *see also id.* at 2561 ¶ 48, 2568 ¶ 59.

In making these determinations, the Commission recognized that its generalizations about the state of competition in local-exchange markets would not hold true for every local market. Thus, although the Commission

sought to incorporate into its national unbundling rules a "substantial degree of geographic specificity," it also understood the importance of having "'safety valves' to mitigate a degree of over- or under-inclusiveness that otherwise would exist in [those] rules." *TRRO*, 20 FCC Rcd at 2559 ¶ 44 & n.131. The Commission, in particular, "encourage[d]" ILECs to file forbearance petitions for specific markets where "sufficient facilities-based competition" had taken hold. *Id.* at 2557 ¶ 39 & n.116.

Given this backdrop, the Commission's decision to consider the availability and use of Qwest's wholesale services in Omaha as part of its § 10 analysis was both reasonable and consistent with its *TRRO* analysis. On the basis of substantial record evidence, the Commission found that, in the nine wire centers, Qwest "is subject to significant competition from Cox, Cox already has constructed an extensive competitive network," and Cox is successfully competing with Qwest for both enterprise and residential customers. Order n.177 (J.A. 87). Cox's competitive presence is significant, the Commission explained, because "Cox's ability to absorb customers without reliance on Qwest's local exchange facilities" gives Qwest "very strong market incentives" to ensure that its network is being used and, accordingly, will give Qwest the incentive to "make its network available" at reasonable rates and terms to competitive carriers. Order ¶¶ 81, 83 (J.A. 93, 94).

The record evidence supported the Commission's prediction. The Commission found that, in the area served by the nine wire centers, the number of DS1 and DS3 facilities that competitors received from Qwest's special-access offering [redacted]

[redacted].[33] In addition, the Commission found that, in those service areas alone, Qwest had entered into [redacted] business QPP and [redacted] business resale arrangements. Order ¶ 68 (J.A. 87–88). With respect to QPP in particular, the Commission noted that Qwest had commercially negotiated [redacted] business and residential arrangements "even in the absence of a legal mandate to do so." Order ¶ 82 (J.A. 94). By way of comparison, competition from § 251(c)(3) network elements was "minor": for the entire Omaha MSA, Qwest provided "at most [redacted] DS1 UNE loops, at most [redacted] DS3 UNE loops, and only [redacted] DS0 UNE loops." Order ¶ 68 (J.A. 88).

The Commission's findings foreclose the CLECs' attempt to rely on the impairment analysis in the *TRRO*. The CLECs contend (at 23–25) that, absent § 251(c)(3) unbundling, Qwest might "abuse" its pricing of special-access service and § 271 facilities—indeed, that "such risks are *magnified* in the Omaha MSA" because Cox does not provide loops and transport on a wholesale basis. But this contention does not come to grips with the Commission's reasonable prediction that Qwest's wholesale pricing will be constrained by the competition it faces from Cox's rival network. Order ¶¶ 81–83 (J.A. 93–94); *Earthlink*, 462 F.3d at 10 (upholding the Commission's prediction that "intense intermodal competition" in the broadband market would encourage the BOCs to offer "reasonable wholesale rates" notwithstanding forbearance from § 271 access obligations). And while the CLECs allege (at 27–28) that resale does not offer the same competitive opportunities as UNEs, the CLECs provide no basis for questioning the

[33] Order ¶ 68 & n.182 (J.A. 87). In the area served by the nine wire centers, competitive carriers obtained [redacted] DS1 and [redacted] DS3 special-access facilities from Qwest [redacted] to end-user customers. *Id.*

Commission's finding that resale is one of several wholesale services offered by Qwest that is currently being used by competitors to provide service to consumers in the Omaha market. *See* Order ¶¶ 67, 68 (J.A. 86–88).

The CLECs also protest (at 25–27) that the Commission's market analysis was inconsistent with paragraph 54 of the *TRRO*, which highlights the analytical difficulties that would be presented if the Commission were to evaluate claims by individual ILECs that § 251(c)(3) unbundling should be eliminated *solely* on the basis of their particular tariffed offerings. As an initial matter, the *TRRO* did not commit the Commission to a forbearance analysis "of the kind described in paragraph 54." *See* CLEC Br. 26. In the *TRRO*, the Commission stated clearly that its forbearance decisions are governed by the "requirements for forbearance" set forth in § 10. *See* 20 FCC Rcd at 2557 ¶ 39 & n.120. Section 10 "imposes no particular mode of market analysis," but instead "allow[s] the forbearance analysis to vary depending on the circumstances." *Earthlink*, 462 F.3d at 8. Thus, the Commission explained in the order on review that its prior unbundling decisions would be "instructive" to its § 10 analysis, but they would not "bind" its forbearance determinations. Order ¶ 63 (J.A. 84); *see also* Order n.177 (J.A. 86–87). In *Earthlink*, the Court, quoting similar language elsewhere in the order on review, confirmed the Commission's ability "to adapt forbearance decisions to the circumstances." 462 F.3d at 10; *see also id.* (quoting Order n.52 (J.A. 61)).[34]

[34] Contrary to the CLECs' suggestion (at 18–19), *AT&T Corp. v. FCC*, 236 F.3d 729, is consistent with this view. In *AT&T*, the Court remanded so that the Commission could explain why it found market-share data "essential" to its forbearance inquiry where the petitioner had presented "evidence other than the market share data" to support its lack of dominance and the Commission had considered such evidence in its prior decisions. *Id.* at 734–

In any event, there is no inconsistency. The Commission noted in the *TRRO* that the analytical difficulties described in paragraph 54 would be attenuated in markets characterized by significant facilities-based competition. *See* 20 FCC Rcd at 2564 n.151. Here, in light of the Commission's findings about Cox's network deployment, the Commission did not have to consider whether forbearance from § 251(c)(3) was warranted solely on the basis of Qwest's wholesale offerings; it could also take account of its prediction that competition from Cox would create incentives for Qwest to offer wholesale services at reasonable rates in the absence of § 251(c)(3) loops and transport. Order ¶ 83 (J.A. 94).

4. Although [redacted], Order ¶ 66 (J.A. 86), the CLECs argue that the Commission's decision to forbear from § 251(c)(3) with respect to the mass market was unreasonable. Br. 35–36. First, they contend that the Commission should not have cited Qwest's residential QPP offerings, *see* Order ¶ 67 (J.A. 86–87), because the loop component of QPP was available as a § 251(c)(3) network element. This argument—which was buried in a footnote in a single *ex parte* letter—is barred under § 405(a). *See Bartholdi Cable Co.*, 114 F.3d at 279 (issues raised in an affidavit and a footnote incorporating arguments by reference insufficient to preserve argument); *accord Time Warner*, 144 F.3d at 79 ("even where an issue has been 'raised' before the Commission, if it is done in a less than complete way," § 405(a) has not been met). In any event, QPP is a *package*, consisting of loops, switching, and transport, that Qwest has no legal

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737. In contrast, as explained in the text, the Commission did *not* conclude in the *TRRO* that competition generated by an ILEC's wholesale offerings would never be relevant in assessing the state of competition in a particular market.

obligation to offer. *See* Order ¶ 82 (J.A. 94). The Commission acted reasonably in considering Qwest's voluntary offering of QPP in its § 10 analysis.

The CLECs' other arguments concerning the mass market have not been adequately presented to warrant consideration by the Court. *United States v. Yeh*, 278 F.3d 9, 16 n.4 (D.C. Cir. 2002) ("[C]onclusory assertions" that "occupy no more than one sentence of [a petitioner's] brief . . . are not properly before this [C]ourt") (internal quotation marks omitted). In any event, those arguments too are without merit. First, the CLECs' concern about "cost-based" pricing for QPP loops ignores not only the fact that QPP is a commercially negotiated package, but also the Commission's reasonable prediction that competition from Cox would give Qwest the incentive to offer wholesale services at reasonable rates. Order ¶ 83 (J.A. 94). Second, as explained above, the Commission's consideration of Qwest's wholesale offerings does not conflict with the *TRRO*; the CLECs' attack on "wholesale DS0 special access offerings" is therefore misplaced. Relatedly, the Commission's separate proceeding to review its special-access pricing rules has no relevance here because special-access services are not typically purchased by mass-market customers. *See Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994, 1997 ¶ 7, 2023 ¶ 84 (2005) (discussing special-access services and customers); *WorldCom, Inc. v. FCC*, 238 F.3d 449, 453 (D.C. Cir. 2001) ("Most users of special access services are companies with high call volumes."). The Commission, moreover, did not rely on Qwest's special-access offerings in granting forbearance from § 251(c)(3) in the mass market. Order ¶¶ 66–67 (J.A. 85–87) (citing competition from Cox and from carriers using Qwest's QPP and resale services).

CONCLUSION

Qwest's petition for review should be dismissed for failure to exhaust under 47 U.S.C. § 405(a). Alternatively, its petition for review should be denied. The CLECs' petitions for review should be denied.

Respectfully submitted,

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November 20, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

QWEST CORPORATION, ET AL., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	No. 05–1450 (AND CONSOLIDATED CASES)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 12511 words.

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